Supreme Court of the United States

OCTOBER TERM, 1961.

No. 283.

JAMES VICTOR SALEM,

Petitioner,

against

UNITED STATES LINES COMPANY,

Respondent.

BRIEF OF RESPONDENT UNITED STATES LINES COMPANY IN OPPOSITION TO PETITION FOR CERTIORARI AND ADDENDUM.

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Plaintiff below petitions for review of an order of the United States Court of Appeals for the Second Circuit (June 9, 1961) reversing in part a judgment for plaintiff filed on December 9, 1960, entered on a general jury verdict after a trial before Chief Judge Willis W. Ritter, of the District Court of Utah, Tenth Circuit, and remanding for a new trial. Plaintiff's petition for a rehearing *in banc* was denied on August 7, 1961.

JURISDICTION.

Although petitioner invokes the jurisdiction of this Court on the grounds that the decision of the court below is in conflict with decisions of other Courts of Appeals and represents a departure from the accepted and usual course of judicial proceedings, petitioner's brief fails to

show any conflict of opinions or any departure from accepted judicial procedure. Petitioner's brief represents a disguised attempt to have this Court review alleged evidence and alleged findings of fact which the court below properly found to be non-existent.

Questions Presented.

1. Whether the court below was correct in reversing a general jury verdict for petitioner and ordering a new trial after a trial replete with prejudicial errors against respondent. These were errors of admission and exclusion of evidence, judicial interference with, obstruction of, and carelessly disguised prejudice against, respondent, climaxed by an erroneous, confusing charge directing the jury to find against respondent on grounds, concerning which, there was absolutely no evidence in the record.

2. Whether the court below was correct in reversing the trial court's award of three years future maintenance where the record is barren of any evidence to support such an award and where the trial court completely failed to make any findings of fact as required by Rule 52 F. R. C. P. to substantiate its decision.

Counter-statement of the Facts.

Most of the salient facts are set forth in the opinion in the court below. However, one statement, hereafter mentioned, is inaccurate. Because of the many misstatements in petitioner's brief as to the facts, it is necessary to make this counter-statement.

Briefly, petitioner testified that as "lookout" seaman he reported for duty at 12:00 midnight to his post in the

crow's-nest. 1a* The crow's-nest was located within the radar tower, a hollow aluminum mast which supported the ship's radar screens. At various levels within the radar tower there were platforms which were reached by a steel ladder which ran from the bottom of the tower to the top, a distance of some 65 feet. The platform which led to the crow's-nest was some 31 feet above the deck. There were five electric lights within the tower. Three of these served the area between the deck and the crow's-nest.

Petitioner testified that when he first reported for duty two of the lower lights were out. 1a The light at the level of the crow's-nest was burning. He said also that the two lights above the crow's-nest were out. 1a It was uncontradicted that it was petitioner's duty to report any absence of lights. It was likewise uncontradicted, indeed the petitioner admitted, that he did not report that any lights were out. 2a

Petitioner left the crow's-nest at 2:00 A. M. 2a He was relieved by seaman Richards. 2a Richards is the seaman against whom charges of negligent rescue were made. Petitioner testified that he returned to duty at 2:30 A. M. on February 16th. 3a At that time, only the light at the level of the crow's-nest was burning. 3a He ascended the ladder to the platform at the level of the crow's-nest and stepped with one foot from the ladder to the platform. As he was carrying over the second foot (right) the light at the level of the crow's-nest suddenly went out. 4a He brought his right foot safely to the platform and then advanced his left foot toward the entrance to the crow's-nest 6a which was only two paces away.** He kept his hands to his sides,

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* Unbracketed references are to the respondent's addendum.

** The Court below inaccurately states that petitioner's testimony is not clear as to whether he fell in the process of bringing his right foot to the platform. 5a, 6a

although if he had extended them he could have taken hold of a shelf (or stiffener) running around the inside of the tower 6a and guided himself to the crow's-nest. There he could have telephoned the bridge for replacements of the burned out bulbs by the ship's night electrician. 7a

In a statement (Pltf's Ex. 7) given on shipboard on the day of the accident petitioner said:

> "• • • When I was coming back from coffee and when I got all the way up to crow's nest level I reached with my foot from the ladder to the platform. At this instant the light went out. I was safe when I was on the platform and I knocked on the door for Richards to open it. He opened it and I tried to put one foot inside and the other one slipped and I fell down on the platform outside of the crow's nest and struck my head on a ladder rung." • • •

There was a very substantial dispute as to the nature and extent of petitioner's injuries. While petitioner's doctors said that he was permanently disabled, respondent's doctors said that petitioner was fit for duty, as did also Marine Hospital doctors. Petitioner's doctors based their opinions on petitioner's complaints that he was unable to walk without a limp and that he was unable to bend or lift. In addition to showing through its doctors that petitioner could perform all these acts, respondent produced motion pictures of the petitioner showing that he was able to walk without a limp, without the need for a cane, and could fully bend and lift. For example, the motion pictures showed petitioner striding along the street at a fast gait, bending over repairing his car and even jacking it up with a hand jack. [Deft's Ex. K]

Moreover, petitioner in applications for drivers licenses, stated that he did not have any mental or physical disabilities. 8a, 9a.

Reasons for Denying the Writ.

Upon a cursory reading of petitioner's brief this Court will discern quickly that, while paraphrasing Rule 19(b) of the Rules of this Court in an attempt to cloak his petition with merit, petitioner fails to show that his case possesses any national significance or that the decision of the court below conflicts with decisions of other Courts of Appeals. In essence, petitioner seeks to have this Court disregard its function and review evidence and facts which the court below has carefully ruled on.

It is a well recognized principle that the certiorari jurisdiction of this Court is a power which is sparingly exercised, and then only in cases which are of grave and general importance. The history of the use of this power was clearly set forth in Justice Frankfurter's dissenting opinion in *Rogers* v. *Missouri Pacific R. R. Co.*, 352 U. S. 500, at pages 530-531, where he stated:

> "Thereafter such [FELA] cases could be reviewed by the Supreme Court only on certiorari to 'secure uniformity of decision' between the Circuit Courts of Appeals and 'to bring up cases involving questions of importance which it is in the public interest to have decided by this Court of last resort. The jurisdiction was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing. . . . These remarks, of course apply also to applications for certiorari to review judgments and decrees of the highest Courts of States'. *Magnum Co.* v. *Coty*, 262 U. S. 159, 163-164. (See also *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.*, 240 U. S. 251, 257-258: Certiorari jurisdiction 'is a jurisdiction to be exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision.')"

This Court has frequently held that it will not grant certiorari to review evidence or discuss specific facts, *United States* v. *Johnston*, 268 U. S. 220, 227. See also *Houston Oil Co.* v. *Goodrich*, 245 U. S. 440; *Southern Power Co.* v. *North Carolina Public Service Co.*, 263 U. S. 508; *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U. S. 175, 178. Since petitioner's brief falls squarely within the above prohibitions, this petition should be denied.

POINT I.

THE PETITION IS WITHOUT MERIT AND SHOULD BE DENIED. PETITIONER HAS FAILED TO SHOW ANY CONFLICT OF OPINIONS BETWEEN THE COURTS OF APPEALS AND HAS FAILED TO PROVE THAT THE COURT BELOW IS IN ERROR.

In the court below, respondent raised many errors committed by the trial court but the court found it unnecessary to consider all of them because only two of these errors alone were sufficient for a reversal and remanding for a new trial. If this Court should determine that the petition has sufficient merit for a writ of certiorari to issue then this Court will have to remand to the Court of Appeals for a further hearing on the many other errors raised but not considered by the court below. However, it was quite clear to the court below sitting both originally and *in banc* that a new trial was necessary so that respondent may have, at least, one fair trial. The petitioner-biased attitude displayed by the trial court left the jury no course other than to find a verdict for petitioner.

Moreover, the trial court not only failed to dismiss petitioner's case for lack of proof as to some of the claims of negligence and unseaworthiness but in its charge it added claims which petitioner did not make. Much of petitioner's

argument in this Court is based on the alleged unsafety of his place of work and on the claim that a jury could decide this issue without the evidence of qualified persons. Naturally, petitioner fails to inform this Court that in the 1½ years during which he had performed his work in this area of the ship, he never before had experienced any trouble or difficulty. Petitioner also omits informing this Court that during the 8½ years the vessel had been in service there never had been an accident on the platform of the crow's nest, 10a, although at least 6 men traversed this area 30 times a day. 11a. This is clear evidence that the place was safe.

Petitioner boldly omits any reference to the trial court's exclusion from evidence of an exact size reproduction of this entire radar tower at the level of the accident. The reproduction was excluded on motion by petitioner. There was no basis for this exclusion. Everything within the tower on the ship was included within the full scale reproduction. At an earlier trial the reproduction had been admitted in evidence.

Had the reproduction been admitted the jury could have seen for itself that handrails or other devices were not necessary.

The Court of Appeals ordered a new trial with respect to the negligence count because of error in the charge to the jury. The trial court ordered the jury to award petitioner damages "if you find the defendant was negligent in failing to provide railings or other safety devices". The Court of Appeals correctly found that there was no evidence of any kind in the record to support this charge. It was not shown that railings could feasibly be constructed or should have been installed, or for that matter that

failure to provide such railings constituted negligence or made the ship unseaworthy. Nor was there any proof that railings could have prevented the accident. On the contrary, the proof showed that petitioner made no effort to support himself by use of his hands. He could have done this merely by extending his arms to the sides of the tower where he could have held on to a ledge projecting at about the level of his shoulder. Moreover, there were other objects within reach which he could have grasped. This petitioner failed to do. Petitioner admitted that at the time of his accident his hands were at his side so, hypothetically, even if there were additional handholds to which petitioner could have grasped for support, the fact of the matter is he did not attempt to grasp anything.

Petitioner did not even maintain on the trial that there should have been "other safety devices". This was one of the prejudicial matters that the trial court inserted in the absence of any claim or proof thereof. Moreover, there was never even a suggestion as to what the "safety devices" should be.

Actually, petitioner's claim as to railings and "other safety devices" should have been dismissed for failure of proof; allowing petitioner a second chance to make this proof is more than he deserves.

The opinion of the Court of Appeals states 33a.

> "Plaintiff and a seaman, Richards, testified that there was no railing inside the tower at the crow's nest level of the tower. However, there was testimony that there was a radar enclosure or casing which plaintiff could hold to, and did grasp with his left hand, as he stepped onto the platform. Plaintiff also testified that there was a shelf or stiffener encircling the inside of the tower about shoulder high as plaintiff stood on the platform. The tower

> enclosure varied from 36 to 48 inches in width so that plaintiff could have reached each side of the wall of the tower from the platform by raising his arms. There was no expert testimony that proper marine architecture required the additional provision of railings or other safety devices on such a ladder or platform enclosed within a tower leading to a crow's nest."

After posing the question to itself whether or not, under the above conditions, the jury should have been permitted to decide whether proper marine architecture required railings or other safety devices, the court below found it was error to submit this question to the jury without expert testimony. All of the reported cases say that to find liability there must be some proof of negligence. Petitioner's claim concerned ship construction and a lay jury could not determine what was or was not proper construction without some evidence to guide it. Petitioner offered none. Respondent proved that the area had always been safe.

Having found prejudicial error in the charge to the jury, the court employed the language used in *Fatovic* v. *Nederlandsch-Ameridaansche Stoomvaart, Maastchappij* (2 Cir. 1960), 275 F. 2d 188, 190:

> "Since we cannot determine from the general verdict brought in by the jury whether they relied upon a proper or improper claim of unseaworthiness in reaching their decision, we must reverse the judgment and order a new trial."

Petitioner's claim of "fairly obvious danger" is likewise without merit. The alleged "danger", the manhole in the platform, through which the ladder passed, is necessary to admit one to the platform. As the testimony showed,

the crow's nest ladder on the SS. *United States* is safer than on other vessels where the crow's nest ladders are exposed to the elements and require seamen to ascend a straight ladder some forty feet. In contrast, the ladder on the SS. *United States* is within the tower and has 4 or 5 platforms on which a seaman can rest on his way to the crow's nest.

The opening in the crow's nest platform is only 18" by about 20" to 30". Petitioner had safely negotiated this opening and had taken a step away from the opening when his accident occurred. 6a. Had petitioner taken one more step he would have been at the door leading into the crow's nest. Thus, he was safely on the platform away from the opening and away from the "obvious danger". The access hole in the platform did not cause his accident. Having served as a lookout on the SS. *United States* for approximately 1½ years before his accident, petitioner had climbed the ladder and crossed to the crow's nest on hundreds of occasions without incident. In point of fact, since the SS. *United States* was constructed in 1952, there has been but one accident, petitioner's, on the crow's nest platform. It is well established that respondent could not be held negligent in constructing or maintaining the crow's nest platform on its vessel when respondent was unaware of any defective or dangerous condition existing therein. There had never been any accidents in this area. Certainly, this area could not be considered one of "fairly obvious danger".

> "The fact that premises or appliances have been used for many years by many persons, without injury, or that no evidence was produced that any other person than the plaintiff had been injured, is a strong circumstance in disproof of negligence in the use of such premises or appliances." 1 *Shearman and Redfield on Negligence*, Section 59, at 168, Revised Edition (1941).

See also *Hubbell* v. *City of Yonkers*, 104 N. Y. 434, 10 N. E. 858; *DiSalvo* v. *Stanley-Mark Strand Corp.*, 281 N. Y. 333; *Levinowitz* v. *Cunard White Star*, 129 F. Supp. 555 (S. D. N. Y. 1955); *Martucci* v. *Brooklyn Children's Aid Soc.*, 140 F. 2d 732 (2 Cir. 1944). See also the annotations of various state court decisions in 31 A. L. R. 2nd 190.

In Point I of petitioner's brief there are many cases cited supposedly in support of petitioner's contentions but none of these cases is in point with the case at bar.

In *Zinnel* v. *United States Shipping Board Emergency Fleet Corp.*, 10 F. 2d 47 (2 Cir. 1925), the plaintiff was ordered out on the ship's well deck to secure a deck load of lumber which had come loose from its lashings during a heavy storm. The lumber was loaded flush up against the ship's rail and rose above the rail. There was no guard line erected to assist plaintiff while working on top of the cargo during the heavy storm conditions. The vessel shipped heavy seas and plaintiff was washed overboard. The court held that whether the absence of a line along the port side was a failure to exercise reasonable care to furnish plaintiff with a safe place to work was a question properly for the jury. The rail which had been provided for his protection was obstructed by the lumber.

In *Kennair* v. *Mississippi Shipping Co., Inc.*, 197 F. 2d 605 (2 Cir. 1952) the Court of Appeals affirmed an award for plaintiff holding that when the alleged negligence of defendant was a failure to maintain a light at the top of an elevator shaft down which plaintiff had fallen or to have a location indicator on the shelter deck at which level the elevator was usually located when the ship was in port, the trial court's instructions, whether a reasonably prudent person would have had a light or some indicator and

whether the absence thereof was the proximate cause of plaintiff's fall, was a proper instruction. This condition as to elevators is true as to shore elevators.

In *Krey* v. *U. S.*, 123 F. 2d 1008 (2 Cir. 1941) the court held that a ship's shower was unseaworthy where the shower was equipped with a concrete floor which sloped downward as one would enter the shower while stepping over a ten inch sill. Moreover, there were wooden slippery boards, serving as a mat, which were covered by soapy water. In addition, within the shower there were no handrails or other devices by means of which a bather could catch or support himself when entering or while in the shower. Shore showers have some form of handhold.

In *Clark* v. *Iceland Steamship Company, Ltd.*, 6 A. D. 2d 544, 179 N. Y. S. 2d 708, (1st Department 1958), the Appellate Division reversed a verdict for the plaintiff on the grounds that there was an erroneous admission of opinion evidence and a failure to charge the jury on a material element of liability, amounting to prejudicial error. In that case, plaintiff introduced, over the appellant's objection, expert testimony to the effect that the absence of a lifeline between stowed hatch covers and the ship's rail rendered the vessel unseaworthy and was the proximate cause of plaintiff's falling from the top of the stowed hatch covers over the rail and into the water. The court stated that the resolution of the issue of unseaworthiness depended upon whether the construction of the vessel afforded adequate space for the proper stowage of the hatch covers between the hatch coamings and the ship's rail and, in addition, whether there was sufficient deck passageway for the longshoremen to pass by. Even though there was expert testimony that the absence of said lifeline

made the vessel unseaworthy, the court found that the record did not establish improper construction of the vessel.

In *Desrochers* v. *United States*, 105 F. 2d 919, (2 Cir. 1939) evidence was introduced that safety ropes were ordinarily employed on ships to prevent seamen from falling into open hatches and that respondent failed to install such a safety rope. The court found that respondent was negligent and that such negligence contributed to the injuries. It was uncontradicted that there was no safety rope on the left side of the bulkhead where plaintiff sustained his fall but a safety rope had been rigged through stanchions on the right side of the bulkhead.

The facts in *Campbell* v. *Tidewater Associated Oil Company*, 141 F. Supp. 431 (S. D. N. Y., 1956) are completely distinguishable from the facts in the case at bar. There a seaman slipped and fell while descending from a tank top to the deck, by using a cleat which was welded to the side of the tank. Since anyone using these narrow cleats to ascend or descend from the top of the tank was provided with no handrails or handholds, it was impossible for one to maintain his equilibrium. Such is not the case here. Admittedly, the ladder was safe 11a. The trial court erroneously submitted to the jury the safety of the ladder.

The cases cited on page 21 of petitioner's brief are totally irrelevant. *The Pennsylvania*, 86 U. S. 125 and *Mason* v. *Lynch Brothers Company*, 228 F. 2d 709, concern themselves with the burden of proof placed upon a party who has violated a statute. *Hill, Jr.* v. *Atlantic Navigation Company*, 218 F. 2d 654, stands for the proposition that where a place of injury is in the owner's control, and the injured employee is without fault, and the

injury would not have occurred if the party in control had exercised ordinary care, then in the absence of any explanation for the cause of a flash fire or explosion, the inference is warranted that the employee's injury was due to the negligence of the person in control.

Read v. *United States*, 201 F. 2d 758 (3 Cir. 1953) was an admiralty action by a carpenter employee of a subcontractor who was converting salt water ballast tanks into fresh water tanks. Recovery for the libellant's injuries, sustained when he fell into a deep tank, was upheld on the grounds that there was uncontradicted evidence of defective lighting appliances and absence of sufficient illumination in the area where libellant, who was unfamiliar with the ship, sustained his injuries.

On Page 22 of petitioner's brief, petitioner cites as a case in point *Johnson* v. *Griffiths S.S. Co.*, 150 F. 2d 224 (9 Cir. 1945). That the facts in that case are not similar to the ones in the instant case is quite evident when one examines the full quotation from the court's opinion, on page 226, which petitioner carefully took out of context:

> "There is evidence that the vessel was anchored in an open roadstead, under blackout conditions with no lights on deck; the weather was freezing and ice and sleet were on the deck; the vessel was pitching heavily; the passageway in the forepeak was obstructed with dunnage and debris; the guard on the steampipe over which the men were required to walk was loose and shaky causing limited visibility from the leaking steam. Under these circumstances the maintenance of an open hatch with no lifeline about it constitutes negligence which is so closely related to the injury in this case as to impel the conclusion that it was the proximate cause of the death."

POINT II.

THE COURT BELOW CORRECTLY REVERSED THE TRIAL COURT'S AWARD OF THREE YEARS FUTURE MAINTENANCE WHERE THE RECORD WAS DEVOID OF ANY EVIDENCE TO SUPPORT SUCH AN AWARD AND WHERE THE TRIAL COURT FAILED TO MAKE FINDINGS OF FACT AS REQUIRED BY RULE 52 F. R. C. P.

Rule 52 F. R. C. P. provides in part: "In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; * * *"

Without making any findings of fact or conclusions of law the trial court granted petitioner three years future maintenance with the following statement (Pet.'s brief page 12):

> "It seems to me that the poor man ever since the accident in 1958 has been trying to get relief from this condition, trying to get some assistance, to get well, to get on his feet. He made a couple of attempts to go to sea, which was unsatisfactory. There is a report in the medical record that he is still not fit for duty. He has a rehabilitation program to go through. There is a long medical history here, exhaustively gone into on the trial of this case. In my view he has not reached that point where maintenance should be cut off. At this time my judgment is three years is a reasonable time within which to anticipate that he is going to need it, and I am going to allow it upon that basis, and on the basis of the $8 a day."

The court below properly found this statement was not in compliance with Rule 52 nor was there any evidence to substantiate the award. The court commented: 35a.

> "The only evidence pertaining to a period of future maintenance, or the duration thereof, is the testimony of two doctors. Dr. Graubard testified to the effect that, at the time of the trial, plaintiff was still disabled and not capable of any work as a seaman. Dr. Kaplan testified to the effect that the likelihood of improvement was remote, and that it may be that plaintiff would get worse and require more specific therapy. There was no evidence that plaintiff required three years future treatment. Plaintiff's doctors did not testify as to probable duration of future treatment, if any. We do not think there was sufficient evidence upon which to base a finding of a three year future maintenance period."

After discussing *Calmar Steamship Corp.* v. *Taylor*, 303 U. S. 525, the court made reference to *Farrell* v. *United States*, 336 U. S. 511, wherein it was held that maintenance and cure payments would be required only until such time as the seaman was cured or was found to be incurable. Relating this language to the facts in the case at bar, the Court stated: 36a

> "The extreme uncertainty surrounding either or both of these possibilities would appear to make any award for future maintenance improper in this case. For instance, in the instant case, there is, in addition to the possibility of plaintiff's full recovery from his back injuries, the further possibility that his not-so-latent psychotic condition might get the better of him at any time. If he became permanently insane, even if that condition were reliably linked to the accident, his maintenance payments would cease."

Further on in the opinion, the court commented: 36a.

> "There does not appear to be any sufficient basis, by opinion evidence or otherwise, for the finding that

> three years is the period reasonably to be expected for Salem to reach maximum improvement."

Petitioner contends the unanimous decision of the court below in reversing the award for future maintenance flies in the face of the principle enunciated by this Court in *McAllister* v. *U. S.*, 348 U. S. 19. The "clearly erroneous" doctrine is not applicable here for the very reason that the trial court made no findings of fact and conclusions of law thereon. In *McAllister* (an admiralty case) this Court ruled that where the district court makes findings of fact and conclusions of law they will not be reversed unless they are clearly erroneous. In the case at bar, the trial court made no findings of fact. The *McAllister* principle is not involved here.

In the absence of any evidence to sustain it, or any findings by the trial court indicating the bases for its decision, the court below was clearly correct in reversing the award for future maintenance.

CONCLUSION.

IT IS RESPECTFULLY SUBMITTED THAT THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE:

1. THE JUDGMENT BELOW IS NON-FINAL. A NEW TRIAL HAS BEEN ORDERED.

2. THE DECISION BELOW DOES NOT CREATE ANY NEW RULE NOR IS IT IN CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEALS.

3. PETITIONER FAILED IN HIS PROOF BUT MAY MAKE ANOTHER ATTEMPT ON THE NEW TRIAL.

4. THE GRANTING OF THE PETITION COULD DO NO MORE THAN REMAND TO THE COURT OF APPEALS WHICH WOULD HAVE TO REVIEW THE NUMEROUS OTHER ERRORS COMMITTED BY THE TRIAL COURT.

Respectfully submitted,

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ADDENDUM TO BRIEF.

Excerpts from Testimony.

James Victor Salem, Plaintiff—Direct.

(49) What is it you want to say about the light?

The Witness: The two top lights are never on, they were never put on. The one in particular at the crow's nest, on my watch, I never see them out except at the accident. But the other two lights below this, yes. One day they blow and a couple of other days they blow. It is like this a couple of months.

Q. Before the accident? A. Before the accident, yes.

Q. When you came to work at midnight, when on February 15 it finished on February 16 it started, you relieved Terry, is that right? A. That's right.

Q. When you came to this radar tower and opened the door, what did you see with respect to the first light? Was that on or off? A. You mean from the bottom?

Q. Yes. A. No, no lights.

Q. No light there? A. No.

Q. You climbed up a little way. What did you see about the second light? A. It was still not on.

(50) Q. You got up to the crow's nest platform. Was that light on? A. Yes.

Q. That light was on at 12 o'clock? A. Yes.

Q. The two lights on top had always been on? A. No, not on. They were not on.

Q. Did you talk to Terry before he left? A. Before he left?

Q. Did you talk to him, yes or no? A. Yes, I did talk to him.

Q. In the regular course of your work do you report to him about conditions you observe in the radar tower? A. Of course. We discussed it for five minutes.

Mr. Connor: I object to this method of trying to get hearsay evidence in.

The Court: No. He is trying to keep it out, really. He is entitled to ask him, yes or no, whether he had

any discussion with Terry in the regular course of business.

Mr. Klonsky: Terry will be a witness in this case, too, subject to cross examination.

Mr. Connor: I must object to any conversation (51) or any question which implies anything.

The Court: He is not doing that.

Mr. Connor: I would like to object to any question which implies the subject matter of hearsay conversation.

The Court: If there is anything like that, we will sustain it.

• • • • • •

Q. Did you call the bridge at that time to talk about the lights you saw were out? Yes or no. A. No.

Q. You had talked to Mr. Terry before? (52) A. Yes.

Mr. Connor: I object to that. There it is again. I knew he would do it.

Mr. Klonsky: There is a reasonable inference to be drawn, your Honor, which I think should be made in this case.

Mr. Connor: That is a statement to the Jury. It is perfectly obvious what he did. It is highly improper.

The Court: We have passed that. We don't have to have any more discussion about it.

• • • • • •

Q. Do I understand your coffee break came two hours later, at 2 o'clock? A. That's correct.

Q. You were relieved by Richards? A. That's right.

Q. When you left the crow's nest for your coffee break, what did you observe about the lights in the radar (53) tower? A. The same light was on, but the other four lights were off.

Q. This light that was still on is the one you talk about at the level of the platform of the crow's nest? A. That's correct.

James Victor Salem, Plaintiff—Direct.

Q. Let us talk about this light for a minute. In the part of the light that faces the crow's nest—do you follow me? A. Which?

Q. That back part of the light that faces the crow's nest, was that covered or exposed? A. It was not exactly covered. Like if this is the light, it just covered from here to here. But still the light is shining down to the platform.

Q. In other words, to prevent the light from going into the crow's nest, the back part of the light was covered with something? A. Yes. Just only the forward.

Q. The forward part of the light would be the part that faces the crow's nest? A. Correct.

Q. That part of the light which faced the ladder (54) was open? A. That's correct.

Q. It shone down on your platform? A. Yes.

Q. That light was on when you left at 2 o'clock too? A. That's correct.

Q. You went to your coffee break. What time did you come back? A. I come back 2:30.

Q. When you came back at 2:30, what did you see about the lights then? A. It was the same thing. In fact, I was going to report it to the bridge again to remind him about fixing it.

Mr. Connor: I move to strike out what his intentions were.

The Court: That may be stricken.

Mr. Connor: I ask the Jury to disregard it.

The Court: The Jury is instructed to disregard it.

Q. Was there a telephone in the crow's nest that was connected to the bridge? A. Yes.

• • • • • •

(56) Q. Before the accident, this time at 2:30 a.m. in the morning. Tell us where you were when the light went out, et cetera. A. I was climbing the ladder. You want me to start this way? It is better for me.

Q. Go ahead. A. I climbed the ladder. Then when my foot reached it, the level of the platform, then I started to

swing myself, and I put my left foot to the platform, and at the same time, when my foot is secure, then I put my left hand around the—what do you call this again?

Q. The casing. A. The casing. So I lift my right foot and tried to cross it to the platform. That's when at this moment, between the platform and that ladder, when the light come off.

(57) Q. That light on the platform level came out? A. Yes. That one at the crow's nest level.

Q. While you were still swinging over? A. With the right foot, yes.

Q. Was there any other light of any kind in this radar tower at that time? A. No, no light.

Q. No light at all? A. No.

Q. It was black? A. Yes. I get scared.

Q. Tell us what happened. A. I getting scared. Everything went black inside. I getting scared. The first thing for me to do is, I got to move away from that hole, because there was a hole behind me. I remember my face was facing forward.

Q. You mean towards the crow's nest? A. To the crow's nest, yes. So I start to move my left foot to get in the middle, my left foot, and at the same time, just about the time before I moved my right foot—I didn't even move it yet—that's when I slipped and fall there.

Q. When you fell, what part of your body hit what (58) part of the platform and what else happened? A. From my foot to the lower of my back, I was laid down on the platform, and in this open hole, my half body was in the open hole. By the time I step in and I fall down—I am lucky—I was lucky enough. When I strike my head to the rear, at the same time I grabbed this ladder and I was lucky enough to hold it. That was the only one way to save me.

Q. Let's see if we can understand you more clearly. When you slipped you went backwards? A. Yes.

Q. When you went back, you were with your back to the ladder you had just come up? A. Yes. I struck my head.

Q. Your hand was on the ladder when you released it? A. Not the ladder. What do you call that?

Mr. Klonsky: The casing.
The Witness: The casing.

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(75) Q. I am talking now about the time of your accident. Do you understand that? A. Yes.

Q. I say that after the light went out, you had your both feet on the platform. A. That's correct.

Q. At that time were you facing towards the doorway to the crow's nest? A. It wasn't exactly facing to the door. Just like I told you before, I was half—what do you call this? I was half to the starboard and half to the forward, but more to the forward.

(76) Q. At that time and before you fell, did you have your hands along your sides? A. Before I fall?

Q. Yes. A. You don't make it too clear to me.

The Court: Where were your hands when you fell?

Q. Where were your hands before you fell? A. Just like this (indicating).

Q. Hanging along your sides? A. Yes.

Q. Both hands? A. Yes.

Q. You were not holding on to that radar casing? A. I already moved from it.

Q. You were not holding on to it? A. No.

Q. Then I understand the next thing you did was to take one step forward towards the crow's nest, and then that is the time that you fell? A. No. I already moved one foot before that.

Q. You already had gone one foot towards the crow's nest? A. Not to the crow's nest. To the side; to the (77) middle.

Q. To the middle? A. Yes.

James Victor Salem, Plaintiff—Cross.

Q. Was that step that you took forward towards the crow's nest? A. That's after I take the step with the left foot, and at that time I remember I was in the middle. That's the time I slipped.

Q. In the middle of the platform? A. Yes.

Q. As you stood in that position in the middle of the platform, if you had extended your hands on each side, you could have touched each side of the area or the radar tower, could you not? A. I tried to.

Q. I say you could do it. A. I could, but I don't have the time yet to grab it.

Q. I am talking about after the lights went out. A. Yes.

Q. You had your feet on the platform. A. Yes.

Q. If you had at that moment put your hands out to each side, each hand, you could have touched the radar tower? (78). A. It is dark. You got to feel it. It is completely dark. You got to feel it first.

Q. That's all right. You could feel it. A. By feeling it, of course, that takes time.

Q. All you had to do, I say, if you wanted to take hold of the sides of the radar tower would be to extend your arms away from your body; is that true? A. Which way? Even if you tried to do what you had in your mind, to hold up on top—I got something for me especially. Do you know how long this is (indicating)?

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Q. All I am trying to find out is, if you could have put your hands out, you could have touched each side (79) of the radar tower. A. I am not too sure.

Q. How wide is the radar tower at that place? A. From wall to wall? I think about four foot. I think about that.

Q. Is the radar tower widest at that place, or is it the narrowest at that place? A. The one I am talking about, starboard and port.

Q. What we call athwartship. Do you know what I mean by that? A. No.

Q. My question was what did you find with respect to whether the lights were lit or not on your daily inspections. A. The lights were burning.

Q. That includes all five? A. All five, sir.

* * * * * *

(112) JAMES D'ANDREA, called as a witness by the Defendant, having been first duly sworn, testified as follows:

* * * * * *

(113) *Direct examination by Mr. Connor:*

Q. What is your business? A. I am a marine engineer.

Q. What licenses, if any, do you hold issued by the United States Coast Guard? A. First assistant engineer-steam and third assistant-Diesel.

Q. Is that limited or unlimited license? A. Unlimited.

* * * * * *

(114) Q. What is your job on the Steamship *United States*? A. I am the third assistant engineer, assistant to the chief electrician.

Q. How many electricians are there on the Steamship *United States*, or were in this voyage in February, 1958? A. We have 12 unlicensed electricians and two of us as engineers are in the electrical department.

Q. How are the electricians divided up? Do they all stand regular watches, or how is it done? A. We have six men that stand regular watches—three in the forward end of the ship and three in the after end of the ship, on separate watches around the clock; six men on day work maintenance, and three of them are assigned primarily to just lamping up the ship on different deck levels.

Q. Will you tell us what you mean by lamping up the ship? A. Installing burned out light bulbs and replacing (115) them as such, and going around from stateroom to stateroom on all quarters of the ship and areas of the ship.

James Victor Salem, Plaintiff—Recalled—Cross.

Mr. Connor: I object to any conversation between the witness and an unidentified doctor.

Mr. Klonksy: What he said to the doctor I think is proper.

The Court: He hasn't gotten into anything that is objectionable.

Read it back.

(Record read.)

The Court: Overruled.

* * * * * *

(397) Q. Are you still going as an out-patient to the hospital? A. No.

* * * * * *

(403) Mr. Connor: In view of the time, does your Honor want me to start?

The Court: Yes. Let's see if we can finish with this man.

Mr. Connor: I don't think I can do it in ten minutes.

The Court: Maybe you can do it in 40 minutes. Do you fell dizzy?

The Witness: No.

The Court: Are you all right?

The Witness: Yes.

The Court: If you don't feel right, let me know.

Cross examination by Mr. Connor:

* * * * * *

(408) Mr. Connor: There is this question. I will limit myself to the reading of one question: "Do you have any mental or physical disability. If yes, explain." There are two boxes, one for no and one for yes. Mr. Salem put an "x" in the box "no," signifying he had no mental or physical disability.

James Victor Salem, Plaintiff—Recalled—Cross.

There is a license expiring in May, 1961, which has a similar question: "Do you have any mental or physical disability? If yes, explain." And in the box "no" an "x" was placed.

You stipulate that Mr. Salem testified that he put those x's there?

Mr. Klonsky: Yes.

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(409) Q. You operate that car with putting your right foot on the gas pedal; is that right? A. That's correct.

Q. You drive that car some distances at some time? A. That's correct.

Q. You drive that car some distances at some time? A. It depends on how I feel, but generally I drive it, yes.

Q. You have driven it at least 40 miles on one trip, haven't you? A. 20 miles each trip, yes, when I see my children.

Q. You also have driven the automobile from Newark into New York here to see your lawyer on four or five occasions? A. I don't know. Probably I do, once every two (410) months, something like that, yes.

Q. When you travelled from New Jersey to New York, you come through one of the tubes under the river, do you? A. That's correct.

Q. In addition to driving this 20 miles you speak of, do you also drive around your own neighborhood? A. That's correct.

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(415) What would you say the distance is from the forward edge of the platform where the opening is up to the crow's nest?

Mr. Klonsky: Your Honor, we stipulated on that.

The Court: I thought all the dimensions were stipulated to. We have the specifications here somewhere. There is no use trying to wring that out of this chap. You have a speech difficulty here.

Richard W. Ridington, for Defendant—Cross.

Q. During the eight and a half years that you have been an officer on the vessel, did there ever come to your knowledge an accident in the radar tower, at the level of the crow's nest?

Mr. Klonsky: In the ten years?

(158) Mr. Connor: The eight and a half years.

Mr. Klonsky: I object to that, whether anybody else had an accident. I don't believe that is material.

Mr. Connor: We have recited some cases supporting that, your Honor.

The Court: Objection overruled.

A. Outside of Salem's accident, there has been none other.

Mr. Klonsky: I press my objection and ask that it be stricken. I believe that is immaterial, because the circumstances are different. Unless he says the circumstances are the same, with all the lights out, without skidproof paint, with the vessel rolling in the sea, then it might be germane. But merely to say there is no record previously is not correct. Anything I don't have a right to ask about afterwards I don't think is fair and proper.

The Court: I don't think it is fair, and it isn't fair, and it is improper in this sense. I believe it is incompetent. Your objection to it will go to its weight.

Mr. Connor: That is all.

Cross examination by Mr. Klonsky:

(159) Q. In the eight and a half years that you had been chief officer and at times executive officer, did you ever have advices that all the lights within the radar tower had gone out at the same time? A. No, sir; outside of the night that Salem was supposed to have had his accident.

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James Victor Salem, Plaintiff—Cross.

(83) Q. Tell me this. Where on you did that stiffener come? What part of your body did it come up to? A. Where I am when I was standing on the platform?

Q. Yes. A. I was almost in the middle, right here.

Q. Where on your body, how far up on your body, did this stiffener come that I point to? A. You mean how high from my body.

Q. Yes. I think it comes up to my shoulder. I think.

Q. That is your best recollection? A. Yes.

* * * * * *

(84) Mr. Connor: I think so.

I think it is conceded that there was no claim made that the ladder was in any wise defective.

Mr. Klonsky: That's true.

Q. In your work on that ship you would step from that ladder about four times a day, isn't that so? A. That's correct.

Q. You would also step from the platform to the ladder another four times a day? A. From the platform to the ladder or from the ladder to the platform?

Q. From the platform to the ladder. A. That's correct.

Q. You have been doing that work and going into that area for about four or five months, anyway, hadn't (85) you? A. It was more.

Q. How much more? A. I would say close to a year.

Q. Except for vacations, you would be doing that all those times for that period of a year? A. In the vacation?

Q. Except for vacations. A. Yes.

Q. In the daytime, when you opened the door to the crow's nest, you would get the sunlight to come into that area, isn't that true? A. No.

Q. I want to be sure I understand you. You say that when the door leading into the crow's nest was opened in the daytime, that no light would come into that area? A. In the daytime?

Q. Yes. A. If the door is open?

(841)

Charge of the Court.

The Court: (Ritter, J.) Ladies and gentlemen of the jury, it now becomes my duty to tell you what the law of this case is. It is your obligation under your oath to pay strict heed to what the Court has to say and to follow that law. I am going directly to the case.

The plaintiff has filed a claim here which we call a complaint in which he has three causes of action: first, the plaintiff claims that the defendant was negligent, and the plaintiff claims that the defendant was negligent in that while the plaintiff was proceeding to his area of work in or about the radar tower on the ship the *United States*, climbing a ladder, reaching a platform, stepping across the platform, stepping across the manhole to a platform, and where he fell and was injured, the defendant was negligent in having that platform in a slippery, worn condition; and he claims that as a result of that slippery and worn condition, which he claims was negligent on the part of the defendant, that he fell, and that he suffered injuries.

The plaintiff claims the defendant was negligent in another particular. He claims that the (842) defendant was negligent in not having proper lighting at the time and at the place and under the circumstances of this accident. He claims two things there. He claims first an omission, a failure to provide any lighting, or proper and adequate lighting, and he claims, next, a commission, that is, the providing of improper or inadequate lighting, or improper and out-of-order electrical wiring and electrical fixtures.

Ladies and gentlemen of the jury, the plaintiff claims another item of negligence, and that is the plaintiff claims the defendant was negligent in failing to provide reasonably safe railings or other safety devices in or about the radar tower in question.

I am going to move to the third cause of action. You will observe in what I have said up to this moment that the

plaintiff's claim in the first cause of action, in all three particulars to which I have referred, is concerned with the negligence of the defendant. Now I am going to move on to his third cause of action, which is not based upon negligence at all.

It isn't necessary for him to show the defendant was negligent. Indeed, as I shall tell you (843) shortly, the due diligence of the defendant does not excuse him from a breach of the obligation which the plaintiff here claims the defendant breached, and that is the obligation to provide a seaworthy ship.

A seaworthy ship, ladies and gentlemen of the jury, is not confined to the hull of the vessel—a sound ship in that sense. It applies also to the ship's appurtenances and the appliances on the ship. The plaintiff claims here in his complaint that he was injured as a result of a breach by the defendant of the obligation to provide a reasonably safe and sound vessel and appurtenances and appliances, and he claims that that failure caused his fall and his injuries, and he claims damages for those injuries.

Before I go on to the defendant's answer, I must talk to you about the second cause of action. I have spoken now about the first, which is based upon negligence in three particulars: the permitting of the platform to be worn and slippery and dangerous; second, the failure to provide railings or safety devices; and third, the failure to provide adequate lighting or any lighting at the time of the accident; and the commission or active side of that particular aspect of the case, of providing poor, inadequate and improper (844) lighting or out-of-order electrical fixtures and parts.

The third cause of action, not based on negligence at all, but based on the unseaworthiness, is a different doctrine and which I am going to talk to you about pretty soon. I don't want you to be confused about the two theories upon which the plaintiff is proceeding here.

In the first cause of action he must show that the defendant was negligent. I am going to define that for you pretty

soon so that you know what we mean by that. In the third cause of action he doesn't need to show that the defendant was negligent at all. I am going to define unseaworthiness more particularly for you shortly. I am now attempting to open up the case to you by showing you the general outlines.

The defendant in answer to the complaint filed its answer. The defendant in its answer admits some things that are important here, and so far as they are admitted they are laid out of the case. You need not concern yourself with them. The defendant's answer admits that the defendant owned, operated, controlled, managed, equipped and manned the vessel the SS. *United States* at all times that are important in (845) this lawsuit.

The defendant also admits that the plaintiff was in the employ of the defendant as a lookout, an able seaman, at the times important in this lawsuit.

The defendant United States Lines, Incorporated, which is the owner and operator of the ship, denies that the defendant was negligent in any one and all of the particulars on which the plaintiff bases his claim, and the defendant denies that the ship was in any way unseaworthy.

The defendant goes further and alleges the accident was the sole and complete result of the plaintiff's own negligence, and particularly the defendant claims that the plaintiff was negligent is not repairing the lighting situation himself, and secondly, in not reporting the poor lighting situation of the bridge to his employer.

Ladies and gentlemen of the jury, I now want to address myself a little further to the second cause of action, which is also based upon negligence, and that deals with the seaman Richards' alleged negligence. You will recall there is a claim here, which we call the second claim of action in this case, that the seaman Richards, hearing the screams of the plaintiff after he had fallen, came out of the lookout, (846) the crow's-nest, and attempted to assist the plaintiff.

He got him up on the edge of the manhole, sat him there, and assisted him to put his arm around some enclosure. As I understand it, the enclosure is some metal enclosure in which there are wires and conduits. This is all in the dark, because there are no lights. The plaintiff claims that Richards then said, "I want to go to the phone and make a call for help. Do you think you can hang on?"

The plaintiff in effect said, "I believe so." And Richards went out to make the call.

I want you to understand clearly the nature of the claim here. What plaintiff claims, as Mr. Klonsky explained to you with respect to Richards, is that if you find that the defendant was negligent in any one or two or three of the three particulars in the first cause of action, and if you find that that negligence was the cause, the competent producing cause, of the plaintiff falling and becoming injured, then you are entitled, ladies and gentlemen of the jury, to take into account any injury or damage that you find was occasioned by the second fall as a consequence fairly and reasonably following from the first, and to allow damages for it, whether or not you find Richards to have (847) been negligent.

Of course, if you find Richards to have been negligent in what he did or failed to do in looking after the plaintiff, then, of course, that negligence likewise is attributed to the shipowner, who is responsible for it; and if you so find, and find that the negligence caused the plaintiff to fall the second time and from that fall he sustained injuries, you should award your verdict to him on that cause of action, too, and award him damages.

Again to repeat before I go on, I am now talking, not about unseaworthiness, I am now talking not about the absolute liability of the shipowner if he fails to maintain a ship, appliances and appurtenances reasonably fit for the purpose for which they are intended; I am going to now talk to you for a little while about negligence, and that is

the basis for liability with which we are concerned in the first cause of action and the second cause of action. After that I shall talk with you about unseaworthiness, and that we will be concerned with in the third cause of action only.

Now with respect to negligence, ladies and gentlemen of the jury, in this state of the record, which I have outlined to you by telling you what the (848) plaintiff claims and what the defendant denies, and what the defendant claims, I say to you that the plaintiff in this case, Mr. Salem, has the burden to produce evidence before you which you believe and which satisfies your minds by the fair preponderance thereof that his injuries were caused by defendant's negligence. The term "preponderance of the evidence," ladies and gentlemen, means merely the greater weight of the evidence.

This is a civil case as distinguished from a criminal case. You folks have been sitting in the court house here sometimes and you may have tried a criminal case or two. You may have heard the judge charge you in the case at hand, namely, in a criminal case, that it is your duty to examine the evidence and the State has the burden to satisfy your minds beyond a reasonable doubt. The plaintiff doesn't have that kind of burden here. The plaintiff's burden here is to produce evidence before you which satisfies your minds by a preponderance of the evidence, meaning the greater weight of the evidence.

Now I come, ladies and gentlemen, to the problem of attempting to define for you what we mean by negligence. I am speaking again only of the first (849) and second causes of action. The standard of conduct to which the defendant is held in this case is that of a reasonably prudent man. Of course, you know that the defendant is a corporation, and of course a corporation can act only through its officers, employees, agents, servants; and when I talk about reasonably prudent men, I am talking about the people who act for the corporation, because if they fail to attain to the

standard which the law imposes upon them, they are negligent, and that negligence is imputed to the employer and the employer is responsible for it and may be called to answer in damages for it.

If the defendant, let us say, acts otherwise in the circumstances than a reasonably careful and prudent person would have acted, he is negligent. If what the defendant failed or omitted to do what a reasonably careful and prudent person would have done in similar circumstances, the defendant is negligent. If the defendant did what a reasonably careful and prudent person would not have done, the defendant is negligent. And it is for you folks to apply that standard or measure of conduct to the facts of this case.

The defendant is not liable for non-negligent (850) acts or omissions. The defendant in not an insurer. I am talking now about both, or all three causes of action, for that matter. The defendant is liable on the first and second causes of actions only if you are satisfied by a preponderance of the evidence that the defendant is negligent. The defendant is liable only if what he did or failed to do was negligent or careless within the scope of the legal standard which I pointed out to you. If the acts of officers, employees or agents of the defendant are negligent, that negligence is imputed to the defendant corporation as a matter of law, and the corporation defendant may be held responsible for those acts or omissions.

I am going to put it to you hypothetically with respect to the first cause of action. If you should find, after deliberating in this case, that the defendant acting through such employees or officers or agents was negligent, as I have defined it to you, in permitting the metal platform to be and remain in a worn, slippery and dangerous condition, or two, if you find the defendant was negligent in failing to provide railings or other safety devices, or three, if you find the defendant was negligent or careless in failing to provide any or reasonably adequate (851) lighting, or if you find the defendant was negligent in providing danger-

ous or inadequate lighting or electrical wiring or parts in the radar tower, and if you further find that such negligence, if any you find, was a contributing cause to plaintiff's falling and his injuries, your verdict should be for the plaintiff, and you should assess his damages. I shall tell you about the measure of damages later. I am talking only about the first cause of action now.

On the other hand, ladies and gentlemen of the jury, if you do not find the defendant negligent in one or more of the particulars claimed by the plaintiff, or if you do not find that such negligence, if any you should find, was a contributing cause of plaintiff's injuries, then your verdict should be for the defendant on the first cause of action.

On the second cause of action—and I will put it to you the same way—if you should find that plaintiff's fellow seaman Richards was negligent in placing plaintiff after he had first fallen and was injured, if you so find, in a seated position on the platform at or about the edge thereof and then left him alone and in the dark while the seaman went into the crow's nest, if you so find, and if you (852) further find that such negligence, if any, contributed to cause plaintiff to fall again, causing new injury to his person or aggravating or increasing the severity of the injuries already suffered, if any you find, your verdict should be for the plaintiff and against the defendant and assess plaintiff's damages—again about which I shall speak later. I have been speaking only of the second cause of action.

I have already told you that plaintiff makes two claims with respect to the second cause of action. If you find the negligence and the negligence caused the second fall, if you find there was a fall, and the plaintiff was further injured, or prior injuries were aggravated in any way, you may find for him. But there is another theory with respect to the second cause of action, and that is if you find for the plaintiff on the first cause of action and find the defendant negligent, then you may find on this record, if that be the state

of your mind, that the second fall was a consequence of the first, and assess damages for the plaintiff and against the defendant such damages you may find that consequentially followed as a result of the first fall and by reason of the second fall.

On the other hand, ladies and gentlemen of (853) the jury, if you do not find the defendant negligent on the second cause of action, or that that negligence, if any you find, was the cause of plaintiff's fall and injuries, or if you do not find that there was additional injury in the fall following from the negligence, if any you find, on the first cause of action, then you should find for the defendant on the second cause of action.

Ladies and gentlemen of the jury, I move on to the third cause of action, which is based upon an entirely different principle of law. Under the maritime law there is an absolute obligation resting upon the owner to provide a seaworthy vessel and appliances, and if he defaults in the performance of that obligation, the owner is liable for any injuries caused by the breach of the obligation.

The law terms this obligation the shipowner's warranty of seaworthiness. By virtue of it, the shipowner is under a duty to furnish and maintain a ship and its appurtenances reasonably fit and suitable for their intended use. The standard is not perfection, but reasonable fitness. What I am saying is not to suggest that the owner is obligated to furnish an accident-free ship. The duty is absolute; but it is the (854) duty only to furnish a vessel and appurtenances reasonably fit for their intended use. The standard is not perfection, but reasonable fitness, a vessel reasonably suitable for her intended service.

This obligation of the defendant does not at all depend upon negligence. The shipowner is not freed from liability by the mere showing of due diligence to render her seaworthy. The warranty imposes upon the shipowner, such as the defendant here, the duty to maintain a reasonably sound ship with safe and proper appliances, in good order

and working condition, reasonably fit for their intended purpose.

Underlying this principle, ladies and gentlemen of the jury, is a humanitarian policy which is derived from history and experience in the shipping trade over many years. It is derived from and shaped to meet the hazards of a seaman's occupation under conditions of traditional discipline on ships at sea. The plaintiff here contends that the conditions referred to in his first and second causes of action made the ship or its appurtenances and appliances unseaworthy within the scope of the principle to which I have been referring. In particular, the plaintiff claims that he was caused to fall and was injured as a result (855) of the defendant's breach of its obligation to furnish a vessel or appurtenances reasonably fit for their intended use, in that, one, the defendant permitted the metal platform to be and remain in a worn, slippery and dangerous condition and not a safe place to work; in that, two, the defendant failed to provide railings or other safety devices; in that, three, the defendant failed to provide any or reasonably adequate lighting; and that, four, the defendant provided dangerous and inadequate lighting and electrical wiring and parts inside the radar tower, rendering it an unsafe place to work.

If you find, ladies and gentlemen of the jury, and I put it to you if you should find from a preponderance of the evidence, that, one, the metal platform in or about the crow's-nest was not reasonably fit for its intended use by reason of its condition, as we have referred to it, and not a safe place to work, I say if you so find, ladies and gentlemen, and if you further find that such condition was a competent producing cause of plaintiff to fall and to become injured thereby, your verdict should be for the plaintiff and you should assess his damages, as I shall indicate later. I say to you, ladies and gentlemen of the jury, (856) further, if you should find from a preponderance of the evidence that the radar tower in or about the crow's-nest was not reasonably fit for its intended use by reason of the

defendant's failure to provide railings or other safety devices and was not a safe place to work, I say to you if you so find, and if you further find that such condition was a competent producing cause of plaintiff to fall and to become injured thereby, your verdict should be for the plaintiff and you should assess his damages. I say further to you, ladies and gentlemen of the jury, if you should find by a preponderance of the evidence that the radar tower in and about the crow's-nest, and the ladder there, too, were not reasonably fit for their intended use by reason of the defendant's failure to provide any or reasonably adequate lighting, or by reason of the defendant providing dangerous and inadequate lighting, if you so find, and if you further find that such conditions were a competent producing cause of plaintiff to fall and to become injured thereby, your verdict should be for the plaintiff and you should assess his damages.

Should you find against the plaintiff on any one cause of action or several causes of action, (857) you may nonetheless find for him on another. Of course, ladies and gentlemen of the jury, with respect to seaworthiness as well as with respect to negligence, if your findings are against the plaintiff on these various claims, your verdict should be for the defendant upon such claim as you find against the plaintiff.

Ladies and gentlemen, as a seaman, the plaintiff does not assume the risk of an unsafe place to work and cannot be blamed for working in an unsafe place. The negligence of fellow seamen or ship's officers cannot be imputed to the plaintiff, but as a matter of law is imputed to the defendant, who is responsible for the negligent acts of plaintiff's fellow crew members or ship officers, if any you should find. The negligence of any fellow seaman is not a defense, and such a negligence is computed to the shipowner.

The comparative-negligence rule applies to this case in both of its aspects. That is to say, the contributory negli-

gence of the plaintiff, if any you should find, is not a defense either to the claims based upon negligence or the claims based upon unseaworthiness. The contributory negligence of the plaintiff is a defense to this action only if his negligence is sole and complete; that is to say, if his negligence (858) alone produced the accident and his injuries. If both were negligent, if that should be your finding, if the defendant was negligent and his negligence contributed to cause the injury, or if the ship in one of the particulars I mentioned was unseaworthy, or its appliances and appurtenances were unseaworthy, and those conditions caused the fall and the injury, and if you find that the plaintiff, too, may have been negligent in one or more of the particulars claimed by the defendant, and the plaintiff's negligence contributed in some wise to the accident and his injuries, then you just don't find for the defendant. This isn't the defense. We apply the rule of comparative negligence in these cases, and the way that operates is you find, if you reach this point, what his damages should be, what his recovery for the whole injury, assuming it to be caused by the defendant, should be, and then you reduce that proportionately to whatever extent, by whatever fraction, you think the plaintiff's negligence may have caused or contributed to cause his injury.

Ladies and gentlemen of the jury, even if a light goes out suddenly and creates darkness that the shipowner may not have yet had notice about or time (859) to correct, nonetheless there may be a breach of the warranty of unseaworthiness within the meaning of the principle upon which we are operating. The owner's duty to furnish a seaworthy ship is no less with respect to an unseaworthy commission which may be only temporary. The shipowner's actual or constructive knowledge of the unseaworthy condition is not essential to his liability. Liability for a temporary unseaworthy condition is no different than when the condition is permanent.

Charge of the Court.

Ladies and gentlemen of the jury, I have spoken about contributory negligence on the part of the plaintiff The plaintiff had a duty, too, to exercise reasonable care and prudence in the performance of his work for his own safety. If you find that plaintiff failed to exercise reasonable care and prudence in looking after his own safety and in failing to correct the dangerous condition, if any you find, if you find he so failed, or in failing to record it to the proper authority for correction, if you so find, and if you further find the plaintiff's negligence, if any you find, contributed to cause his injury, such contributory negligence is not a defense to the action, as I told you, unless his negligence is the sole (860) and complete cause of the accident. He is entitled to recover a sum of money based upon a deduction of what he is entitled upon his percentage of his own contribution to the accident.

Ladies and gentlemen of the jury, there are some general things about which I want to talk to you before I come to the subject of damages. As regards any dormant or pre-existing condition which did not disable the plaintiff, if you find he had any, if it was activated or brought to light by reason of trauma—and that means, as you have been told many times, injury—imposed by the defendant, then the defendant must completely respond in damage as if the plaintiff did not have this prior idiosynerasy

Now we come to the subject of damages, ladies and gentlemen. Damages are divided into special and general damages. It is my duty to talk to you about all these issues in this case. I have talked about the issues of liability, based first upon negligence, secondly, upon unseaworthiness. If you find for the plaintiff upon any one or more of those claims, it will be your duty to assess the plaintiff's damages. The damages are divided into special and general damages. What we mean by special damage is loss of earnings, loss (861) of earnings that has been sustained in the past, loss of earnings that is being sustained in the present, and future loss of earnings, if any you find. Spe-

cial damages include medical obligations, out-of-pocket expenses for his doctors and medicines or hospitalizations, if any you find, and it includes not only those expenses up to date, if any you find, but also future obligations incurred and reasonably expected to be required hereafter.

General damages, ladies and gentlemen of the jury, include pain and suffering, permanency, humiliation, embarrassment, the interference with plaintiff's right to enjoy his life in a normal and reasonably pain-free manner, any loss of bodily function, if you should so find.

In considering his loss of earnings, you should take into account his past earnings, of approximately $600 a month, as I remember the evidence, but if I misstate the evidence, it is for you ladies and gentlemen to determine that matter upon your own recollection. In any event, you should take in his prior earnings, his monthly earnings, in computing his past loss of earnings and his reasonably-expected future earnings, if any you should find.

(862) In determining any award of damages with respect to his future loss of earnings, you may consider the United States Life Tables, sometimes called the Mortality Tables, sometimes called the Actuarial Tables, published by the National Office of Vital Statistics. Those tables say that a white male, 37 to 38 years of age, at the time of this accident, had an average remaining lifetime of 33.86 years.

Ladies and gentlemen of the jury, you are the sole judges of the evidence in this case, the sole judges of the facts, and the sole judges of the credibility of the witnesses here. By credibility of the witnesses, I mean it is for you to determine whom you will believe and what you will believe. It is for you to determine where the ultimate truth in this case lies, because there is a conflict in the evidence.

Ladies and gentlemen of the jury, when I examined you on your oath at the beginning of this trial, I charged you it would be your obligation to decide this case on the evidence

and on no other matter. Of course, I charged you, too, as I have now, that you must pay attention to what the Court says about the law. I say to you, ladies and gentlemen of the jury, the evidence in this case is the exhibits, and it is also (863) the testimony of the witnesses who have been sworn, examined and cross-examined before you here, and it is your duty to decide the case on that evidence. You are the sole judges of it. I have been charging you. Counsel addressed you in summation. Counsel addressed you at the beginning of the trial. We have all had something to say during the course of the trial. I want to say to you that nothing that counsel has said to you and nothing that the Court has said to you is evidence. You are obliged to follow what the Court has to say about the law.

The Court is entitled to comment upon this evidence, if I want to. I can take each one of these causes of action and tell you what I think about it. At the same time I should be obliged to tell you that no matter what I thought about it, it is for you and for you alone to decide what you think the evidence shows and to reach your own conclusion. I don't think it is necessary in these cases for the Court to comment on the evidence, so I don't do it. But I want to say to you if the Court said anything, or if counsel, either, said anything during the course of this trial, it is your privilege to disregard it, so far as it refers to the evidence of the facts. You may not disregard what (864) the Court has said about the law.

Ladies and gentlemen of the jury, when you retire to deliberate upon your verdict, heed well the instructions. Take as much time as you want. We will send the exhibits in with you. If there is any help we can give you, please feel free to communicate with me and we will try to assist you in any way that we can. Don't be in a hurry about this. You can proceed in your own way. You should examine this evidence carefully, thoroughly, deliberate upon it, without any bias or prejudice of any kind, way, shape, matter

had within him seeds that came out. I never made any such statement.

He said on several occasions that I wanted the Jury to throw the plaintiff in the street. I think that is a most unfair statement about what I said, and I think it is an appeal to passion and prejudice and highly prejudicial to the defendant. I think the Jury should be instructed that there was no such contention.

(868) The Court: I think I gave a pretty strong instruction on that. That was intended for the benefit and to the detriment of both of you.

Mr. Connor: I take that position, your Honor.

The Court: You take any position you want. You make your record. I have been doing this quite a while, too.

* * * * * *

(872) Mr. Connor: I except to so much of your Honor's charge in that you said in words or substance that the Jury can find the defendant negligent or the vessel unseaworthy because of defective wiring on the ground that there was no such evidence in the case upon which the Jury could make such determination.

I also except to that part of your Honor's charge—and you repeated this on a number of occasions, what I have just mentioned and what I am going to say now —that the defendant could be found negligent or the ship unseaworthy on proof that the electrical fixtures and other appliances were not fit, or that they were negligently furnished.

I also except to that part of your Honor's charge in which you said in words or substance that the Jury might find the defendant negligent or the ship to be unseaworthy for failure to furnish railings or handrails.

I except to so much of your Honor's charge in which you said in words or substance that the defendant would be charged with any negligence on the part of Richards in attempting to effect a rescue.

(873) Your Honor charged the Jury that the plaintiff could not be blamed for working in an unsafe place. I ex-

cept to that because it is not complete. If the place where the plaintiff was working was unsafe by reason of his own negligence, then he can be charged with it.

The Court in charging the burden of proof I believe limited the consideration of burden of proof to considerations of unseaworthiness or negligence, whereas the same measure of proof was not required as to the damages. In other words, I don't think your Honor made clear to the Jury that in considering whether or not the plaintiff is entitled to damages, his proof must be by a fair preponderance of the credible evidence, and also, of course, as to the extent of any damages.

With respect to whether your Honor wants me to name these, I except to your Honor's failure to charge the last sentence in my request to charge, number one, dealing with the situation where if the evidence was evenly balanced and the plaintiff could not recover and that the defendant would be entitled to a verdict.

I don't think it was made clear to the Jury that in connection with the claim of negligence the only requirement on the part of the defendant was to exercise reasonable care to furnish a reasonably safe place and (874) reasonably safe appliances. I except, therefore, to your Honor's failure to charge with respect to number *three*.

Your Honor indicated that you would in substance charge number *five* and number *six*, and I except to that.

Also, you said you would charge in substance number *seven*, *eight* and *nine*, none of which I submit your Honor has charged, and therefore I take exception.

Your Honor failed to charge number *ten* and said you would not charge. I except to that.

I except to your Honor's failure to charge number *sixteen*.

In respect of charges requested by the defendant, number *twenty-four*, which deals with the way the Jury should view Richards' conduct, your Honor said you would give it in substance, and I don't recall that it was, and therefore I except.

Defendant's Exceptions to the Charge.

Your Honor said you would not charge number *twenty-five*, and I except to that.

I had asked your Honor to charge in respect of the elements of damage and the fact that certain motions had been denied. In other words, I asked your Honor to charge the Jury the fact that you mentioned elements of injury to the Jury should not be regarded as (875) an indication that you had any feeling about the matter one way or the other.

The Court: I told them. Didn't I tell them if I mentioned it it was my duty to do it along with all the other issues in the case? I did.

Mr. Connor: I may have missed it.

The Court: I had that in mind. Maybe so.

Mr. Connor: The same in respect to the denial of various motions.

The Court: I never say anything about that.

Mr. Connor: I must add here, your Honor, that I was quite concerned with respect to the number of times in which your Honor mentioned the elements upon which plaintiff claimed the right to recover damages. I didn't keep any record of it, of course, but it seems to me that the numerous repetition of those charges is prejudicial to the defendant as indicating a view on your Honor's part that these charges had substance and should be accepted by the Jury.

The Court: I certainly had no intention of doing that. But what is done is done. I felt it is a little complicated—and it was for me. Three causes of action itself is not complicated, but there were three parts to the first cause of action, the two views of the (876) plaintiff about his second cause of action, and then unseaworthiness based upon the first and second causes of action and conditions therein existing, if any they found and I was trying to make it crystal clear to the Jury what it is we were expecting them to address themselves to and to accomplish. Be that as it may, of course, you have your exceptions.

Colloquy.

Since you raised the question of the burden of proof, I think I will charge them with that in the morning. I won't charge them now because it is too late.

You said I didn't address myself in the charge on the burden of proof on the subject of damages.

Mr. Connor: That's right.

The Court: I don't want to have anything wrong with the charge on a simple thing like that. While I am doing it, I will say the burden is on the defendant to produce evidence which the Jury believes and which satisfies their minds by a preponderance thereof, that there was contributory negligence in the case. I will do it more artfully, of course.

Mr. Connor: I dislike the term "contributory negligence," because it implies by its very terms that the defendant also was negligent. May I suggest to your Honor that when you do give that charge, instead of (877) labelling the contributory negligence, you label it plaintiff's negligence?

The Court: I have already referred to it as contributory negligence. I think I will do it in terms I have already charged.

* * * * * *

(885) The Court: I called you back to say two or three small things to you before you commence your (886) deliberations.

In the first place, as I talked with you, I told you there were three causes of action in this case. I may have emphasized that so strongly that you may be under the impression that you are to say something in your verdict about each one of those causes of action. That is not true. All that is necessary is that you bring in a general verdict, if that is the state of your mind in this case; that is, a verdict for the defendant, if that be the state of your mind, or a verdict for the plaintiff, if that be the state of your mind, and assess the plaintiff's damage.

Opinion of U. S. Court of Appeals, Second Circuit.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 385—October Term, 1960.

(Argued May 10, 1961 Decided June 9, 1961.)

Docket No. 26875

JAMES VICTOR SALEM,
Plaintiff-Appellee,

v.

UNITED STATES LINES COMPANY,
Defendant-Appellant.

Before:

FRIENDLY and SMITH, Circuit Judges,
and WATKINS, District Judge.*

Appeal by defendant United States Lines Company from judgment for plaintiff in the Southern District of New York, Willis W. Ritter, *J.*, on a general jury verdict based on negligence and/or unseaworthiness and an award of future maintenance and cure by the court. Reversed and remanded.

WALTER X. CONNOR, New York City (KIRLIN, CAMPBELL & KEATING, and JAMES P. O'NEILL, New York City, on brief), *for appellant.*

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* United States District Judge for the Northern and Southern Districts of West Virginia, sitting by designation.

ROBERT KLONSKY, Brooklyn, New York (HERMAN N. RABSON and DiCOSTANZO, KLONSKY & SERGI, Brooklyn, New York, on brief), *for appellee.*

WATKINS, District Judge:

This is an appeal from an action wherein plaintiff-appellee sought recovery for injuries sustained while he was employed as an able bodied seaman on a vessel owned and operated by defendant-appellant. The action was based on allegations of negligence, unseaworthiness, and right of maintenance. Defendant appeals from a judgment against it totalling $123,968.00, plus costs, made up of the following elements: (1) A general jury verdict for $110,000.00 damages for personal injuries due to negligence and/or unseaworthiness; (2) A maintenance award by the court for $13,968.00, including $8,760.00 for three years future maintenance, and $5,208.00 for past maintenance. Appeal is also taken from the order denying defendant's motion to set aside the verdict, for judgment for defendant *non obstante veredicto*, and for a new trial.

We feel this case must be reversed on two grounds: first, because of an erroneous and prejudicial instruction given by the trial judge; and second, because of a lack of evidence to support the trial judge's finding of three years future maintenance.

Appellee was an able bodied seaman on board the luxury liner S.S. *United States*. His principal duty on board was to act as lookout. He reported for duty at 12:00 midnight on the night of February 16, 1958, to his post in the crow's nest. The crow's nest is a lookout post located within the ship's radar tower, a hollow aluminum mast which supports the ship's radar screens. At various levels within the radar tower, are platforms, reached by a steel ladder running from the bottom of the radar tower to the top, a distance of some sixty-five feet. The platform which

led to the crow's nest was some thirty-one feet above the deck. There were five electric lights within the tower, two below the crow's nest level, one approximately at the level of the crow's nest, and two higher in the tower.

When plaintiff reported for duty at midnight, all the lights were out except the one at the crow's nest level. He left the crow's nest at 2:00 A. M. on Monday, February 16, having stood two hours of his four-hour watch, and having been relieved at this time by a fellow seaman, one Richards. The accident complained of occurred when he was returning to duty at 2:30 A. M. At that time there was still only one light burning in the tower, the one at the level of the crow's nest. Plaintiff ascended the ladder to the platform at the level of the crow's nest and stepped with his left foot from the ladder to the platform. As he was carrying over the right foot, the remaining light in the tower went out, and the area was in complete darkness. His testimony is not clear as to whether he fell in the process of bringing his right foot onto the platform, or whether the fall occurred after he had both feet on the platform. At any rate, he fell, striking his head on the ladder, and his back on the edge of the platform. He saved himself from a further fall down through the tower by holding on to the ladder rungs. He then called for help, and Richards came to his aid from the crow's nest. Richards pulled him up to a sitting position on the platform, and asked him three or four times, "Can you hold yourself until I make a phone call?" Plaintiff finally answered, "Yes, I guess so." Richards then placed plaintiff on a narrow ledge with both feet dangling into the open space, with his arm around a pipe casing. Richards left to enter the crow's nest to telephone the bridge. Plaintiff then became dizzy, called out for help again, but was not heard, and fell for the second time, losing consciousness. He fell to a point about eight feet below the crow's nest platform, where he was rescued by men with flashlights.

The complaint contained four causes of action, based on:

1. The negligence of defendant and its employees (Jones Act, 46 U. S. C. §688).

2. Negligence on the part of Richards, in that, while attempting to rescue plaintiff, he caused plaintiff to have a second fall.

3. The unseaworthiness of the vessel.

4. Recovery for past and future maintenance.

The trial judge instructed the jury among other things that their verdict should be for the plaintiff, "if you find the defendant was negligent in failing to provide railings or other safety devices." Due exception was taken to this and other portions of the charge.

There was no evidence of any kind in the record to support the view that railings or other safety devices could feasibly be constructed, or that failure to provide them constituted negligence or made the ship unseaworthy. Plaintiff and a seaman, Richards, testified that there was no railing inside the tower at the crow's nest level of the tower. However, there was testimony that there was a radar enclosure or casing which plaintiff could hold to, and did grasp with his left hand, as he stepped onto the platform. Plaintiff also testified that there was a shelf or stiffener encircling the inside of the tower about shoulder high as plaintiff stood on the platform. The tower enclosure varied from 36 to 48 inches in width so that plaintiff could have reached each side of the wall of the tower from the platform by raising his arms. There was no expert testimony that proper marine architecture required the additional provision of railings or other safety devices on such a ladder or platform enclosed within a tower leading to a crow's nest. Should the jury, under these conditions, have been permitted to decide whether proper marine architecture required railings or other safety devices?

In two recent cases, this court has held that a jury should not be permitted to speculate on such matters in the absence of expert evidence. In *Martin* v. *United Fruit Co.*, 2 Cir. (1959), 272 F. 2d 347, a case involving a seaman injured aboard ship while attempting to open an air port, the plaintiff contended on appeal that the trial judge had erred in failing to present an issue to the jury. In a *per curiam* opinion, affirming judgment for defendant, at page 349, this court stated:

> "Finally, we reject the plaintiff's contention that the trial court committed error in not permitting the jury to determine whether the placement of the hinge at the bottom of the deadlight was an improper method of ship construction so as to make the vessel unseaworthy. Surely this is a technical matter in which an expert knowledge of nautical architecture is required in order to form an intelligent judgment. Since no expert testimony was intoduced, it was correct to exclude this matter from the jury's consideration."

The case of *Fatovic* v. *Nederlandsch-Ameridaansche Stoomvaart, Maastchappij*, 2 Cir. (1960), 275 F. 2d 188, involved a seaman injured when struck in the hip by a cargo boom while working as a stevedore on the SS. *Veendam*. The trial judge charged the jury that there were five separate theories upon which the jury might find the ship unseaworthy. One of these theories was the absence of a stopping arrangement to prevent the boom's swinging against the kingpost. This court, in reversing judgment for the plaintiff, found that there was no evidence in the record to support this theory of unseaworthiness, and, at page 190, stated:

> "In any event, the question was one of nautical architecture about which jurors lack the knowledge to form an intelligent judgment in the absence of expert testimony. Martin *v.* United Fruit Co., 2 Cir., 272 F. 2d

347. Since there was no expert testimony on the matter, it should not have been submitted to the jury."

There is another error in this case which we feel requires reversal, and that is the finding of the court as to future maintenance. The trial judge properly withheld the question of maintenance from the jury in compliance with the conditions expressed by this court in *Bartholomew* v. *Universe Tankships Inc.*, 2 Cir., 279 F. 2d 911. There is no dispute here as to past maintenance, the sum of $5,208.00 being agreed upon by both parties. The trial court awarded future maintenance computed on the basis of a period of three years at $8.00 per day. The lump sum award for future maintenance was $8,760.00.

The only evidence pertaining to a period of future maintenance, or the duration thereof, is the testimony of two doctors. Dr. Graubard testified to the effect that, at the time of the trial, plaintiff was still disabled and not capable of any work as a seaman. Dr. Kaplan testified to the effect that the likelihood of improvement was remote, and that it may be that plaintiff would get worse and require more specific therapy. There was no evidence that plaintiff required three years future treatment. Plaintiff's doctors did not testify as to probable duration of future treatment, if any. We do not think there was sufficient evidence upon which to base a finding of a three year future maintenance period.

The two principal Supreme Court cases on the problem are *Calmar Steamship Corp.* v. *Taylor*, 303 U. S. 525, and *Farrell* v. *United States*, 363 U. S. 511. In the *Calmar* case, the trial court had awarded a lump sum payment for maintenance to a seaman suffering from Buerger's Disease. The payment was based on the life expectancy of the seaman as the disease was confidently predicted to be incurable. The key language of the court is as follows:

> "The seaman's recovery must therefore be measured in each case by the reasonable cost of the maintenance and cure to which he is entitled at the time

> of trial, including, in the discretion of the court, such amounts as may be needful in the immediate future for the maintenance and cure of a kind and for a period which can be definitely ascertained."

The language of the court, "immediate future" and "definitely ascertained" would militate in favor of a rather restricted area in which payments for future maintenance might properly be awarded.

The result in *Farrell* futher strengthens this interpretation. There the court held that maintenance and cure payments would only be required until such time as the seaman was *cured or was found to be incurable.* (Emphasis added.) The extreme uncertainty surrounding either or both of these possibilities would appear to make any award for future maintenance improper in this case. For instance, in the instant case, there is, in addition to the possibility of plaintiff's full recovery from his back injuries, the further possibility that his not-so-latent psychotic condition might get the better of him at any time. If he became permanently insane, even if that condition were reliably linked to the accident, his maintenance payments would cease. Whatever the respective merits of a lump sum payment as against successive law suits in the ordinary legal setting, the Supreme Court seems to have indicated that no payments should be made for future maintenance and cure. Justice Jackson strongly hinted at this result in *Farrell*, at page 519:

> "The Government does not contend that if Farrell receives future treatment of a curative nature he may not recover in a new proceeding the amount expended for such treatment and for maintenance while receiving it."

There does not appear to be any sufficient basis, by opinion evidence or otherwise, for the finding that three years is the period reasonably to be expected for Salem to reach maximum improvement.

Defendant makes two other points which we feel should be discussed here since this case is being remanded for a new trial:

1. A claim of absolute bar to recovery because of plaintiff's negligence.

2. The contention that defendant was not responsible for Richards' actions in attempting to rescue plaintiff.

Concerning the first point, the trial judge charged the jury that as a seaman, plaintiff does not assume the risk of an unsafe place to work and cannot be blamed for working in an unsafe place. There was no error in this instruction. *Darlington* v. *National Bulk Carriers, Inc.*, 2 Cir., 157 F. 2d 817. A seaman assumes no risk of employment even of obvious dangers when he acts under the orders of a superior officer. *Becker* v. *Waterman Steamship Corp.*, 2 Cir., 179 F. 2d 713. As to the issue of whether plaintiff should have called someone to replace the burned out lightbulbs, the jury apparently resolved it in plaintiff's favor, and it is not proper for this court to retry factual issues where there is evidence to sustain the finding below. There is such evidence in this case.

As to point number two, we feel that Richards' employer, defendant herein, was responsible for the actions of Richards in attempting to rescue plaintiff. See Judge Soper's opinion in *Harris* v. *Penn. R.R. Co.*, 4 Cir., 50 F. 2d 866, 868; *Buckeye Steamship Co.* v. *McDougal*, 6 Cir., 200 F. 2d 558, cert. den. 345 U. S. 926, affirming 103 F. Supp. 473. Defendant cites the case of *Robinson* v. *Northeastern Steamship Corp.*, 228 F. 2d 679, to the effect that a seaman, voluntarily assisting another seaman in distress is not acting within the scope of his employment, unless the rescue is authorized by the employer. That case is readily distinguishable from the case at hand. In the *Robinson* case, an intoxicated seaman, returning to his vessel from shore leave, was run over by a locomotive within a customs compound adjacent to the dock. The locomotive and the customs compound

were not owned or controlled by the shipowner. The court in that case was careful to limit its holding to the facts; where the accident occurred not on the ship, but on land. We do not think the law in that case applies to rescue situations occurring aboard ship where the seaman being rescued is injured while performing his duties.

We think the correct law applicable to this case to be that the shipowner owes an obligation to effect prompt and proper rescue to a seaman injured in the performance of his duties aboard ship, and that a seaman who undertakes such a rescue is acting within the scope of his employment, the employer being liable for his actions if the rescue operation is conducted negligently.

Since we have found prejudicial error in the charge to the jury, we conform to the language in *Fatorie* v. *Nederlandsch-Amerikaansche Stoomvaart, supra:*

> "Since we cannot determine from the general verdict brought in by the jury whether they relied upon a proper or improper claim of unseaworthiness in reaching their decision, we must reverse the judgment and order a new trial."

The judge could have insulated the error in the charge recited by submitting special interrogatories, as is frequently done in such cases, but he chose not to do so.

In view of our conclusion that there must be a new trial, we believe it unnecessary to discuss the many other errors complained of.

Reversed and remanded for a new trial consistent with the foregoing opinion on the issues of negligence, unseaworthiness, and future maintenance. Affirmed as to past maintenance award in the sum of $5,208.00.

SMITH, Circuit Judge (concurring in part and dissenting in part):

I concur in the reversal of the award for future maintenance and cure, for the reasons stated in the opinion. I also agree with the opinion on assumption of risk and responsibility for the fellow seaman's rescue attempt.

From so much of the judgment as reverses the jury award for unseaworthiness or negligence, I respectfully dissent. As the majority points out, the crow's nest was more than thirty feet above the ship's deck with access to the outdoor lookout post obtainable through an internal radar tower. The straight ladder ascending the radar tower faced 180° away from the platform leading out to the crow's nest; reaching the platform entailed the rather dangerous maneuver of transferring one foot at a time from the ladder while turning the body completely around. There was before the jury sufficient evidence, both from oral testimony and from photographs, for it to visualize the platform on and from which plaintiff fell and to determine whether some railing or handhold in addition to the structures present was reasonably necessary for the protection of a seaman passing from the ladder to the platform in the swaying mast.

I do not believe that either the *Martin* or the *Fatovic* case stands for the blanket proposition that any and all theories of negligence and/or unseaworthiness which might touch on the broad field of "naval architecture" may be properly submitted to a jury only if supported by expert testimony. Here the potential danger was fairly obvious and a jury should be perfectly competent to decide whether the handholds furnished were sufficient to discharge the owner's duty to provide his seamen with a safe place to work. Such a determination hardly requires expert knowledge of naval architecture,[1] such as may be required to determine proper construction of deadlights, or the feasibility of a stopping arrangement to prevent a boom from swinging against a kingpost. I would approve the charge on railings or other devices and affirm the award for personal injuries and past maintenance.

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[1] It is somewhat difficult to conceive in what way the construction of railings on an indoor platform would not be "feasible" from the standpoint of naval architecture. If such were the case, however, it would seem more sensible to have the defendant introduce such evidence.

Order Denying Petition for Rehearing in Banc.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT.

JAMES VICTOR SALEM,
Plaintiff-Appellee,

v.

UNITED STATES LINES COMPANY,
Defendant-Appellant.

On Petition for Rehearing In Banc.

HERMAN N. RABSON and DICOSTANZO, KLONSKY & SERGI, Brooklyn, N. Y., for plaintiff-appellee.

The petition for rehearing in banc is denied, Judge Clark and Judge Smith dissenting.

Judge Waterman votes to deny with the following statement:

> An examination of the whole record convinces me that the full retrial ordered by the panel majority is desirable. However, with Judge Smith "I do not believe that either the *Martin* or the *Fatovic* case stands for the blanket proposition that any and all theories of negligence and/or unseaworthiness which might touch on the broad field of 'naval architecture' may be properly submitted to a Jury only if supported by expert testimony."; and I find no reversible error in the failure at the former trial to so charge the jury.

J. EDWARD LUMBARD
Chief Judge

August 7, 1961